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[Hemeon v. Boston Edison Co.](#), 94-ERA-34 (ALJ Dec. 29, 1994)

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In the Matter of:
34

CASE NUMBER: 94-ERA-

KEITH J. HEMEON,
1994

DATE ISSUED: December 29,

Complainant,
v.

BOSTON EDISON COMPANY,

Respondent.

Appearances:

Keith J. Hemeon
Pro Se

John M. Fulton, Esq.
Joan M. Martin, Esq.
For the Respondent

Before: NICODEMO DE GREGORIO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 ("ERA"), and its implementing regulations, found at 29 C.F.R. Part 24. Section 211 of the ERA prohibits covered employers from discriminating against any employee with respect to terms, conditions, or privileges of employment because the employee assisted or participated, or is about to assist or participate in any manner in any action to carry out the purposes of the Energy Reorganization Act or the Atomic Energy Act of 1954, as amended.

PROCEDURAL HISTORY

Keith J. Hemeon ("Complainant") was employed by Boston Edison Company ("BECO") as an engineer from 1988 until his termination in July 1994. Mr. Hemeon filed a complaint with the Department of Labor Wage and Hour Division on June 10, 1994 alleging numerous grounds of discrimination. On July 29, 1994, the Department of Labor ("DOL") notified Mr. Hemeon that its investigation did not verify that discrimination was a factor in the actions alleged in the complaint. On August 3, 1994, Mr. Hemeon appealed the DOL's findings and filed a request for a formal hearing. A hearing was held in Boston, Massachusetts on September 7, 8, and 9. Complainant's and BECO's post-hearing briefs were duly considered.

STATEMENT OF THE CASE

BECO is a licensee of the Nuclear Regulatory Commission ("NRC"). Tr. at 40. Mr. Hemeon was employed by BECO in February 1988 at the Pilgrim Nuclear Power Station in Plymouth, Massachusetts as a senior system engineer. Mr. Hemeon has a B.S. degree in Marine Engineering, and ten years of experience with BECO.

As a senior system engineer, Mr. Hemeon was responsible for supervising various systems in the power plant. Tr. at 60. In addition, Mr. Hemeon was assigned to a collateral duty as the coordinator for the Nuclear Plant Reliability Data System ("NPRDS"). Tr. at 60-61. As coordinator for NPRDS, Mr. Hemeon was responsible for in-putting failure reports of safety related equipment and components, which were transmitted to the Institute of Nuclear Power Plant Operators' ("INPO") data base in Atlanta, Georgia. Tr. at 61-63.

Beginning in 1993, Mr. Hemeon was transferred to other positions at BECO, and finally in 1994, during the process of a company-wide reorganization, Mr. Hemeon was terminated from permanent employment.

Mr. Hemeon's complaint is that his cooperation with INPO, and a memo he drafted in 1990 to Mr. George Davis, the vice president of BECO at that time, 1- constitute protected activity, and 2- were the beginning of, and reason for, a series of adverse employment actions taken against him, culminating in his dismissal from permanent employment at BECO. Tr. at 654-657.

Specifically, Mr. Hemeon claims that because he engaged in

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protected activities in 1990, he was 1- downgraded from a "meets expectations" to a "partially meets expectations" in his mid 1990 performance review; 2- sexually harassed in 1993; 3- denied a pay raise and bonus in 1994; and 4- terminated from his permanent employment in 1994. Mr. Hemeon also contends that a visit he had with the resident inspector of NRC on August 27, 1993, and a June 1994 report he wrote to his supervisor about revising safety related manuals at BECO constitute protected activities, and also contributed to his termination.

BECO denies any sexual harassment, and asserts legitimate, business reasons for the other actions set forth in the complaint.

APPLICABLE LAW

Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851, provides in pertinent part as follows:

(a) *Discrimination against employee*

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

X X X X X

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

In *Dartey v. Zack Co. of Chicago*, the Secretary of Labor set forth general principles relating to the allocation of burdens and order of presentation of proof to apply in retaliatory adverse action cases arising under the ERA and related statutes. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Order, April 25, 1983. The complaining employee must initially present a *prima facie* case by showing that (1) he engaged in protected activity, (2) the employer was aware of such activity, and (3) the employer took adverse action against him. *Dartey* at 7. The

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employee must additionally present evidence sufficient to raise the inference that (4) his protected activity was the likely reason for the adverse action. *Samodurov v. Gen. Physics Corp.*, Case No. 89-ERA-20, Sec. Dec. and Order, Nov. 16, 1993; *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).

If the complainant establishes a *prima facie* case, he obtains a presumption of discriminatory treatment and the burden shifts to the employer to produce an explanation to rebut the *prima facie* case, i.e., the burden of producing evidence that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2747, _ U.S. _ (1993).

Significantly, the burden that shifts to the employer is one of production, or going forward with the evidence, not of proof. The employer must introduce evidence setting forth reasons for its actions which would support a finding that unlawful discrimination was not the cause of the employment action. *St. Mary's*, 113 S.Ct. at 2747. If the employer carries this burden of production, the presumption of retaliatory action raised by the *prima facie* case is rebutted, and drops from the case. It is important to note, however, that although the presumption of retaliatory action shifts the burden of production to the defendant, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's*, 113 S.Ct. at 2747.

DISCUSSION

I

The first issue is whether Mr. Hemeon engaged in protected activity. Mr. Hemeon argues that while he was employed by BECO he engaged in four protected activities. Mr. Hemeon claims that his first protected activity was a memo he drafted to Mr. George Davis, the vice president of BECO at that time, dated April 17, 1990 in which Mr. Hemeon alleges that he outlined inadequacies he found in BECO's data system. Tr. at 16.

Mr. Hemeon claims that he engaged in protected activity when he identified safety concerns to the Institute of Nuclear Power Plant Operators ("INPO") in 1990. INPO is a private organization that provides auditing and consulting services to nuclear power plants worldwide to improve safety and health in the industry. Tr. at 16-19, 28, 34. INPO was formed by the nuclear industry in an attempt to prevent NRC from expanding their reporting requirements. Tr. at 64-65. In lieu of

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reporting safety concerns directly to the NRC, reports are made to INPO, and INPO uses its data base to supply safety information to the NRC. Tr. at 16-19, 65. INPO visits each nuclear plant facility every twelve to eighteen months, and will perform special visits at the request of the utility to assist in a particular area where the utility may need to improve performance. Tr. at 372-376. BECO loans at least one employee to INPO at all times. The assignments last for one year, and require the employee to relocate to Atlanta, Georgia, where INPO's headquarters are located. Tr. at 375-376.

Mr. Hemeon claims that his third protected activity was when he contacted the NRC on August 27, 1993. Mr. Hemeon testified that he notified the NRC that information relating to an inspection that they had made at Pilgrim Nuclear Power Station was not totally disclosed to them. Tr. at 23-24.

Mr. Hemeon testified that his fourth protected activity was when he identified deficiencies in BECO's technical safety-

related manuals. When Mr. Hemeon was in charge of the program that maintains and manages the technical information for the safety related equipment at the power plant, Mr. Robert O'Neill asked Mr. Hemeon to review the safety related system manuals and determine their status. Tr. at 24-25. Mr. Hemeon testified that he reviewed the safety manuals for the Pilgrim Nuclear Power Station, and notified Mr. O'Neill on July 6, 1994 that they were severely inadequate. Tr. at 25.

BECO makes two arguments with regard to Mr. Hemeon's alleged protected activities. BECO argues that Mr. Hemeon's interaction with INPO is not a protected activity because reporting to INPO was "routine and appropriate" for BECO's employees. BECO further argues that Mr. Hemeon's 1990 and 1994 memos are not protected activities because they do not identify issues related to nuclear safety.

Section 211(a)(1)(F) of the ERA, as well as the case law in this area, include more activities than BECO's arguments presuppose. The Act specifies that participation or assistance in an agency proceeding, as well as "any other action to carry out the purposes" of the ERA or the Atomic Energy Act of 1954 are protected. The case law is similarly broad. Internal complaints regarding safety or quality problems, *Samodurov v. Gen. Physics Corp.*, Case No. 89-ERA-20, Sec. Dec. and Order, Nov. 16, 1993; *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984), as well as possible violations, *Kansas Gas and Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) are sufficient to establish protected activity. Even an employee's verbal

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questioning of a foreman about safety procedures constitutes protected activity. *Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044, Dec. and Order of Rem., Oct. 26, 1992, slip op. at 10. As the definition of protected activity is quite broad, I find that all the activities Mr. Hemeon engaged in are "protected" by the ERA.

II

Mr. Hemeon contends that his relations with INPO and his 1990 memo caused him to receive a downgrade in his mid 1990 performance review. Tr. at 655. In 1990, Mr. Hemeon's direct supervisor, Mr. Richard Mattos, reviewed Mr. Hemeon's work, and categorized his performance as "meets expectations." However, this rating was changed to "partially meets expectations" by the department manager. Tr. at 74. Mr. Hemeon called Mr. Mattos as a witness to corroborate his contention, but Mr. Mattos' testimony failed to do so. Tr. at 507; 586-587.

Mr. Mattos testified that after all the performance ratings were submitted to corporate headquarters, the ratings were challenged as being too high. Tr. at 586. Based on this challenge, management reevaluated the ratings and lowered many evaluations one notch. Tr. at 586-587. Mr. Mattos testified that his performance rating was downgraded, and so was Mr.

O'Neill's. Tr. at 587.

Based on Mr. Mattos' testimony, I find that Mr. Hemeon has not established that his downgrading was in retaliation for his protected activity. Mr. Mattos provided a legitimate business reason to explain why the performance evaluations of many BECO employees were downgraded. Furthermore, it is unlikely that BECO would retaliate against Mr. Hemeon for work that they commended him on. In Mr. Hemeon's performance review for the period covering 1990, his supervisor complimented him for taking "initiative to bring to MGTs [management's] attention that NPRDS was going to impact our [BECO's] ratings with INPO/NRC." RX 3. Mr. Hemeon's supervisor also noted that Mr. Hemeon "put together a very well thought out report on the history and need for NPRDS and in fact got \$ [funding] for 1991." RX 3; Tr. at 538. Additionally, BECO claims that management could not have lowered Mr. Hemeon's performance rating in retaliation for the memo Mr. Hemeon wrote to the vice president of BECO because the memo was never sent. BECO explained that Mr. Hemeon's memo was never sent because a memo from a division manager to a vice president is contrary to the normal reporting chain, and the subject matter of the memo was well-known. Tr. at 348-350, 537-538. For these

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reasons, I am not convinced that Mr. Hemeon's protected activity motivated BECO to downgrade his mid 1990 performance review.

III

Mr. Hemeon alleges that because of his protected activities in 1990, he was subjected to intimidating and hostile statements of a sexual nature made by his supervisor, Mr. O'Neill, in March 1993. Mr. Hemeon first mentioned these statements in a memo dated August 25, 1993, but did not categorize them as sexual harassment at that time. Tr. at 81-82; RX 7. Mr. Hemeon first complained that these statements were "sexual harassment" in June 1994. Tr. at 269. BECO investigated Mr. Hemeon's complaint, and determined that the statements did not constitute sexual harassment because 1- Mr. Hemeon did not file a complaint for over a year; 2- Mr. O'Neill denied making the alleged statements; and 3- the alleged behavior was not repeated. Tr. at 269-271.

I find that the alleged behavior, if it occurred, was hardly intimidating. Moreover, I find that Mr. Hemeon has not proven that the alleged behavior of March 1993 was connected in any way to his protected activity of 1990.

IV

Mr. Hemeon alleges that he was denied a pay raise and bonus in 1994 because of the reports he made to INPO and the memo he wrote in 1990. BECO claims that Mr. Hemeon did not receive a pay raise or bonus in 1994 because of his job performance in 1993.

Mr. Cibelli, BECO's human resources manager, testified that

BECO does not give "cost of living" increases, but rather gives merit increases to reward performance. Tr. at 210-217. Merit increases are based on an employee's annual performance evaluation. Tr. at 211-212. Mr. Cibelli testified that most of the people who do not meet expectations are not given increases. Tr. at 213. Mr. Cibelli stated that because Mr. Hemeon's performance was partially meets expectations in 1993, it was appropriate that he did not get a merit increase in 1994. Tr. at 214.

I find that Mr. Hemeon's allegation that BECO formed a scheme in 1990 to take adverse employment actions against him in 1994 is at most a mere speculation. There is no evidence that Mr. Hemeon was denied a pay raise and bonus in 1994 in reprisal for the protected activity he engaged in in 1990. Mr. Cibelli

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provided a legitimate business reason to deny Mr. Hemeon a merit increase in 1994.

V

Mr. Hemeon claims that his termination from permanent employment at BECO in July 1994 was because of 1- his cooperation with INPO in 1990; 2- the memo he wrote in 1990; 3- his August 1993 visit with the resident inspector of the NRC; and 4- the memo he wrote in June 1994.

BECO argues that Mr. Hemeon's termination was a result of an extensive seven year company-wide downsizing effort, which began in 1992. BECO refers to this downsizing as their "complement reduction" program. Approximately 195 positions have been identified for elimination, and the authorized complement has been reduced by about 160 employees since 1992. Tr. at 178-185.

BECO has reduced their employees by increasing managerial spans of control, eliminating functions and their related positions identified as no longer necessary, combining related positions, and implementing new technologies. The employees affected by BECO's reduction in force are given the following options: 1-apply for another position within the nuclear organization, 2- apply for a position within the company; 3- apply for temporary assignments, 4- receive out-placement services, or 5- accept the company severance policy. Tr. 184. When two positions are combined, if one of the affected employees does not voluntarily vacate the position, BECO selects which employee will remain. In selecting a person for reduction, the company considers business needs, employee's skills, job performance, and company seniority if all these criteria are equal. Mr. Cibelli testified that BECO has not had anyone involuntarily leave the company because of their complement reduction program. Tr. at 185. All the employees affected by the program have either found complement or temporary positions within the company, or voluntarily severed from the company. Tr. at 185.

In January 1994, Les Schmelling, the plant manager, asked all the managers to make recommendations for what they could do to reduce BECO's work force. Tr. at 386. Mr. O'Neill recommended that the VETIP and OERP positions be combined because each position required less than one full time person. Tr. at 387. At that time, Mr. Hemeon was the VETIP coordinator and Mr. Cummings was the OERP coordinator. At a conference held in

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January 1994, all the senior managers agreed with Mr. O'Neill that these positions should be combined, and the proposal was presented to corporate headquarters in Boston, Massachusetts for approval. Tr. at 388, 186. In May 1994, the managers at Pilgrim Station in Plymouth, Massachusetts found out that Mr. O'Neill's proposal to combine the positions was accepted by corporate headquarters. Tr. at 187.

When it was determined that Mr. Hemeon's position was going to be combined with that of another, Mr. Hemeon was treated the same way as all the other BECO employees affected by the complement reduction program. Mr. Hemeon and Mr. Cummings were notified on June 9, 1994 that their positions were being combined, and they were both given the opportunity to voluntarily vacate their position and accept a severance package. Tr. at 101, 110. Neither Mr. Hemeon nor Mr. Cummings accepted the severance package, and therefore BECO determined on July 6, 1994 that Mr. Cummings would assume the duties of the combined position. Tr. at 112. Mr. Hemeon was offered a temporary assignment to last approximately eight to thirteen weeks in the design function group. Mr. Hemeon declined that temporary position, and was given until August 5, 1994 to find another job. Tr. at 114. BECO offered Mr. Hemeon another temporary assignment through December 1994, which Mr. Hemeon accepted. Tr. at 114. I note that Mr. Hemeon filed his ERA complaint on June 10, 1994, the day following the notification that the two positions would be combined, and that the selection of Mr. Cummings was made the same date the local manager learned of the complaint. Tr. 111, 112.

Mr. Hemeon argues that the four other engineers in his division should have been considered for elimination in addition to himself and Mr. Cummings. BECO claims that the other four positions were not considered for the merger because the job functions of the other positions are different, as well as the qualifications to perform them. Tr. at 392. I find that even if all six employees were considered for elimination, the result would have been the same. At the request of the DOL investigator, BECO provided a summary of the qualifications of six employees in Mr. Hemeon's division. RX 1. In comparing Mr. Hemeon to the other five, Mr. Hemeon is the only employee who received partially meets expectations rating, and he was the only one who never received an exceeds expectations rating. RX 1.

Additionally, Mr. Hemeon does not put forth any evidence of discriminatory intent, and I cannot find any. Mr. Hemeon's visit with the resident inspector of the NRC in August 1993 does not prove discriminatory intent. There is no evidence that BECO knew

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the content of Mr. Hemeon's alleged reporting to the NRC; there is only evidence that BECO knew that Mr. Hemeon visited with the resident inspector of the NRC, which was a common occurrence among employees. Tr. at 160, 172-173, 298, 376-379. BECO was not notified as to the content of the meeting until the summer of 1994, by reading a newspaper article. Tr. at 298, 376-379. Similarly, the memo Mr. Hemeon wrote in June 1994 is irrelevant to his proving discriminatory intent because BECO's decision to terminate Mr. Hemeon from his permanent position occurred in May 1994. Additionally, there is no evidence supporting Mr. Hemeon's inference that his reporting to INPO and his 1990 memo were in any way connected to his termination. In fact, it is unlikely that BECO took reprisal for Mr. Hemeon performing his job duties. The fact that Mr. Hemeon was complimented for his active involvement with INPO in his 1990 performance review buttresses this conclusion.

Furthermore, Mr. Hemeon does not put forth any evidence that the reason BECO gives for terminating Mr. Hemeon was a pretext for discrimination. BECO presented a legitimate, non-discriminatory reason for terminating Mr. Hemeon. Mr. Hemeon's direct supervisor, Mr. O'Neill, assisted in BECO's company-wide downsizing program by suggesting the combination of two positions in his department. This proposal was not only approved by all the supervisors located at the Pilgrim Nuclear Power Station, but was also approved by the corporate headquarters at another location. Moreover, the two employees affected were given the option of accepting the company severance policy. In this case, if Mr. Cummings had accepted BECO's severance policy, Mr. Hemeon would have automatically remained in the existing position. Because neither employee accepted BECO's severance policy, BECO selected the employee with more experience, more education, and better performance reviews to remain in the combined position. Taking all of these factors into account, I find that BECO's reason for terminating Mr. Hemeon is not a pretext for discrimination.

VI

In sum, Mr. Hemeon began working for BECO in 1988. Except for the downgrading of his mid 1990 performance rating, he had a satisfactory work relationship with co-workers and supervisors until the first months of 1993. In fact, Mr. Hemeon testified that prior to that time he had occasions to see Mr. O'Neill and

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his wife socially, and everything was on a very cordial basis. Tr. at 77. Then, a series of changes occurred in his work relations, which culminated in the severance of his permanent employment in July 1994. Mr. Hemeon was assigned a number of temporary jobs, on the basis of inconsistent justifications; his relationship with a secretary became less than cordial; he learned of rumors among managers that he was mentally unbalanced,

which prompted him to seek a psychological evaluation; and, more significantly, his supervisor, Mr. O'Neill, expressed dissatisfaction with Mr. Hemeon's job performance, began to monitor the time Mr. Hemeon spent on telephone calls, and then wanted to place him on some form of performance improvement program. Tr. at 75-86.

Looking back on these and other incidents, e.g., rumors that he intended to buy a gun and the withdrawal of his security clearance, Mr. Hemeon has convinced himself that in 1990, when he was cooperating with INPO and because of that cooperation, BECO formed a scheme to get rid of him. Specifically, Mr. Hemeon believes that Mr. O'Neill knew in 1990, on the basis of his prior experience in the employ of Combustion Engineering, that sooner or later BECO would have to reduce its work force, and planned at that time to discharge Mr. Hemeon when the downsizing would take effect, and in the meantime gave Mr. Hemeon favorable performance reviews in order to prevent wrongful termination lawsuits. Tr. at 654-656. Accordingly, Mr. Hemeon asks "the court to see through this particular mechanism that they have used, to see through the evidence to see that there's a distinct tie between the concerns and protected actions that I conducted in 1990, and the actions that Boston Edison has taken against me in 1994, and that Boston Edison Company actions in between have just been various attempts to discharge me and insulate themselves from these protected actions". Tr. at 657.

I am unable to accept this invitation. Mr. Hemeon's conspiracy theory is a *priori* improbable, and is supported by mere suspicions, which are contradicted by the testimony of credible witnesses who have given legitimate business reasons for the downgrading of his mid 1990 performance rating as well as his termination in 1994. Mr. Hemeon has not persuaded me that BECO has discriminated against him because in 1990 he performed the work BECO assigned to him, or because in August 1993 he contacted NRC's resident inspector.

RECOMMENDED ORDER

Mr. Hemeon's claim of discrimination under §211 of the

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Energy Reorganization Act is dismissed.

NICODEMO DE GREGORIO
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to

advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).